

STATE OF MICHIGAN
COURT OF APPEALS

VICKIE A. O'BRIEN,

Plaintiff-Appellant,

v

SHARON NOLL SMITH,

Defendant-Appellee.

UNPUBLISHED

August 24, 2001

No. 224629

Oakland Circuit Court

LC No. 98-011342-NM

Before: Fitzgerald, P.J., and Gage and C. H. Miel*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition in this legal malpractice action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

"In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage)." *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). The element of causation requires proof that but for the attorney's negligence, the plaintiff would have been successful in the underlying action. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff asserted that defendant was negligent in failing to file a motion for relief from judgment in a timely manner. While it is true that a motion brought under MCR 2.612(C)(1)(a), (b), and (c) must be filed within one year after the judgment was entered, MCR 2.612(C)(2), and defendant filed the motion at issue thirteen months after the judgment was entered, plaintiff has not asserted that she was entitled to relief under subrule (C)(1)(c). She claims only that she was entitled to relief under subrule (C)(1)(f), and while such a motion must be brought within a reasonable time, it is not subject to any particular time limit. MCR 2.612(C)(2). Defendant could at best have filed the motion two or three months earlier. However, it is impossible to say that the court would have been inclined to look more favorably on the motion had it been brought two or three months earlier, given that a nine-month delay has been held not to be a reasonable time. *Kowalczyk v Jones*, 443 Mich 881; 504 NW2d 185 (1993).

Plaintiff also asserted that defendant was negligent in failing to present certain facts in the motion that would establish the extraordinary circumstances necessary for relief under MCR 2.612(C)(1)(f). *McNeil v Caro Community Hosp*, 167 Mich App 492, 497; 423 NW2d 241 (1988). Defendant raised as a ground for relief that plaintiff's ex-husband made promises of reconciliation which induced the plaintiff to forgo independent legal advice and to sign the consent judgment. Defendant did not raise as an additional ground that plaintiff's weakened psychological state prevented her from understanding the judgment, making a rational and voluntary decision to enter into the judgment, or from resisting whatever pressures her ex-husband brought to bear. However, plaintiff had no evidence that her psychological state was such that she was in fact incapable of making a free, voluntary, and understanding choice or that such evidence, if it existed, was available to defendant when she filed the motion for relief from judgment. Therefore, the trial court did not err in granting defendant's motion.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage

/s/ Charles H. Miel